STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 30, 2023]

JOSEPH PAIVA	:	
	:	
VS.	:	**C.A. No. PC-2017-2602**
	:	
JOHN WARD, in his capacity as TREASURER AND FINANCE DIRECTOR FOR THE TOWN OF LINCOLN	:	

DECISION

LANPHEAR, J. This matter came on for trial before Mr. Justice Lanphear, jury waived, on June 5, 2023.

I

Findings of Facts

In January 2014, Mr. Paiva, plaintiff herein, was arrested and charged with domestic assault by the Lincoln, Rhode Island police. In March 2014, the Town of Lincoln (Lincoln) and the State voluntarily dismissed this charge per Rule of Criminal Procedure 48(a). Shortly thereafter, Mr. Paiva retained an attorney to move to seal or expunge this charge pursuant to G.L. 1956 § 12-1-12.1. The motion was granted. The April 2014 Order directed that "the police records of the above matter are ordered destroyed pursuant to § 12-1-12." Copies of the order were mailed to the Town of Lincoln and the Rhode Island Attorney General.

Mr. Paiva applied for a permit to carry a concealed firearm from the East Providence Police in October 2015. In the application, Mr. Paiva stated that he had not been convicted of a crime and

had not been arrested.[1] Mr. Paiva had a permit earlier which had been revoked. The East Providence Police Department requested records on Mr. Paiva, and Lincoln provided the police report from the 2014 charge. Agreed Statement of Facts, ¶¶ 5-6. The concealed weapon application was rejected by the East Providence Police in January 2016. Mr. Paiva applied for review of the permit rejection to the Rhode Island Superior Court and the Supreme Court. In January 2018, the Supreme Court remanded for a more complete finding of facts, but Mr. Paiva did not continue to pursue the permit. Mr. Paiva paid $200 to an attorney for the sealing of the records and $8905 to a separate attorney for the Supreme Court action.

In 2014, Mr. Paiva applied for a new employment position at a financial institution. The application required a background investigation. An investigator for the employer asked Mr. Paiva about his criminal history. The investigator also requested information from Lincoln, and that town provided records of Mr. Paiva's 2014 arrest. Agreed Statement of Facts, ¶¶ 5-6. Mr. Paiva secured the new employment position.

A

Presentation of Witnesses

Attorney Pine was the first witness who described the motion to seal. He was highly credible. Having filed hundreds of such motions he had little direct recall of Mr. Paiva's motion but described his usual practice.

[1] Oddly, the statute allows criminal defendants to *falsely* state on job applications that they have never been convicted even when, in fact, they have been. Section 12-1.3-4(b). Clearly, the conviction may be nullified by state law, but this statute goes much further, allowing outright misrepresentations. Such a statute must be read strictly, given its derogation of the common law. *Tarzia v. State*, 44 A.3d 1245, 1257 (R.I. 2012).

Mr. Paiva appeared cooperative, consistent, frank and responsive. He appeared prepared for his direct examination, and more hesitant on cross. He alleged that the failure to truly seal the records impacted him but he was not specific, except for the attorneys' fees. He was reluctant to acknowledge that a similar permit had previously been revoked and avoided a specific answer concerning what the employer's investigation discovered. He remained fairly credible.

The parties did not dispute the facts. There was considerable agreement on the facts, and counsel submitted an Agreed Statement of Facts.

II

Analysis

Mr. Paiva is not before the Court now to contest the sealing of his records or to secure his permit. He is before the Court seeking damages for the alleged wrongful release of information from the Lincoln police. His Fourth Amended Complaint sounds in four specific counts and it is these four counts which were pursued at trial:

1. Libel
2. Intentional infliction of emotional distress.
3. Invasion of privacy for false light, unreasonable intrusion, and unreasonable publicity.
4. Interference with contractual relations.

A

Libel

The elements for libel in Rhode Island are:

> '"a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) damages, unless the statement is actionable irrespective of special harm."' *Healey v. New England Newspapers, Inc.*, 555 A.2d 321, 324 (R.I. 1989) (quoting *Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339, 1342 (R.I. 1986); Restatement (Second) *Torts*,

§ 558 (1977))). *See also Swerdlick v Koch*, 721 A.2d 849, 859-60 (R.I. 1998).

The Lincoln Police provided copies of an arrest record to the East Providence Police and to a prospective employer in 2016. By then, Mr. Paiva had successfully obtained an order to seal the court records and police records per § 12-1-12. (Ex. 2.) Even though these were records of a domestic nature, the criminal charges had been dismissed; hence, Lincoln was required to seal the records. Section 12-1-12(a). The town forwarded the records to another police department and a prospective employer. It should not have done so.

However, for a libel or defamation charge, the first element is to demonstrate a false and defamatory statement. While the court may infer that a domestic violence charge injured Mr. Paiva's reputation, it cannot infer or find that the communicated statements were false. In this civil case the burden of proof is on Mr. Paiva to establish the falsity of the records (as well as the other elements of libel). Mr. Paiva did not establish the falsity; hence, the libel claim must fail.

B

Intentional Infliction of Emotional Distress

The Agreed Statement of Facts acknowledges that the sealed records were sent, but it doesn't say why they were sent. Specifically, there was no proof as to whether Lincoln was seeking to harm Mr. Paiva or it was merely negligent. There was no proof to establish why, or how, the Lincoln Police released the records. There was no evidence presented that the actions of Lincoln were intentional. At trial, no town witnesses testified, though the town acknowledged that it forwarded the records to others. There is no dispute that the Lincoln police received notice of the court sealing order.

If the failure was the result of a mere mistake, without something more, Mr. Paiva has not established the failure as extreme or outrageous. If it was a mistake, it caused little harm, was not

shown to place the plaintiff in danger or to harm his work or home life. Therefore, it is not the type of conduct which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Swerdlick*, 721 A.2d at 863. The conduct of Lincoln was not sufficiently outrageous.

To establish intentional infliction of emotional distress, Mr. Paiva must also establish physical symptoms. Mr. Paiva testified concerning the cost to him of the motion to seal, what he believed was harm to his reputation and his expense in pursuing the unsuccessful requests for relief through the Courts. However, there is no evidence of any physical symptoms, the loss of employment, the loss of prospective employment[2] or other harm.

Finally, for "the tort of intentional infliction of emotional distress … we require for recovery … that psychic as well as physical injury claims must be supported by competent expert medical opinion regarding origin, existence and causation." *Vallinoto v DiSandro*, 688 A.2d 830, 839 (R.I. 1997). No medical evidence was introduced, other than the limited testimony of Mr. Paiva.

Having failed to meet these prerequisite qualifications by a preponderance of the evidence, Mr. Paiva has failed to prove the count of intentional infliction of emotional distress.

C

Right to Privacy

Mr. Paiva's third count of the Fourth Amended Complaint alleges an invasion of privacy. The title to count Three is "Invasion of Privacy—False Light, Unreasonable Intrusion, and Unreasonable Publicity". In the text of this count, Mr. Paiva cites only G.L. 1956 § 9-1-28.1(a)

[2] Mr. Paiva testified that he was later employed by the prospective employer who received the Lincoln police records.

(3) and (4). Subsection 3 relates to unreasonable publicity in one's life, while subsection 4 relates to placing one in a false light.[3] Unreasonable Intrusion is contained in § 9-1-28.1(a)(1).

[3] The statute reads, in pertinent part:

> **"9-1-28.1. Right to privacy — Action for deprivation of right.**
> **(a) Right to privacy created.** It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:
> **(1)** The right to be secure from unreasonable intrusion upon one's physical solitude or seclusion;
> **(i)** In order to recover for violation of this right, it must be established that:
> **(A)** It was an invasion of something that is entitled to be private or would be expected to be private:
> **(B)** The invasion was or is offensive or objectionable to a reasonable man; although,
> **(ii)** The person who discloses the information need not benefit from the disclosure.
>
> . . .
>
> **(3)** The right to be secure from unreasonable publicity given to one's private life;
> **(i)** In order to recover for violation of this right, it must be established that:
> **(A)** There has been some publication of a private fact;
> **(B)** The fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities;
> **(ii)** The fact which has been disclosed need not be of any benefit to the discloser of the fact.
> **(4)** The right to be secure from publicity that reasonably places another in a false light before the public;
> **(i)** In order to recover for violation of this right, it must be established that:
> **(A)** There has been some publication of a false or fictitious fact which implies an association which does not exist;
> **(B)** The association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances;
> **(ii)** The fact which was disclosed need not be of any benefit to the discloser.
> **(b) Right of action.** Every person who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to a deprivation and/or violation of his or her right to privacy shall be liable to the party injured in an action at law, suit in equity, or any other appropriate proceedings for redress in either the superior court or district court of this state. The court having

To establish a count of unreasonable publicity, a plaintiff must prove the publication of a private fact [and that] making the fact public would be objectionable or offensive to a reasonable person. *Swerdlick,* 721 A.2d at 858. All facts which were disclosed in Swerdlick occurred on a public street, so none of those facts were found to be private. However, here, Mr. Paiva expected the facts to be private after the counts were expunged. Being charged criminally is surely one which would be objectionable to a reasonable person of ordinary sensibilities. A court order to seal an arrest is "bona fide and of a type that a reasonable person would expect to be observed." *Pontbriand v. Sundlun,* 699 A.2d 856, 865 (R.I. 1997)*; see also Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

An arrest report is often embarrassing and it may be a public document. Here, the alleged assault was deemed private after it was sealed, and not known to be disclosed to any other party. Accordingly, it was appropriate for the report and record to be private and not be revealed. Mr. Paiva has established the town's liability on this count.

The second alleged violation of privacy is that of "false light" per § 9-1-28.1(a)(3). For this count, the following elements must be shown:

1. A false or fictitious statement;
2. An unprivileged publication to a third party;
3. disclosure of something objectionable to a reasonable person; and

(4) unreasonable or highly objectionable publicity.
See Swerdlick, 721 A.2d at 861.

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jurisdiction of an action brought pursuant to this section may award reasonable attorneys' fees and court costs to the prevailing party.
(c) Right of access. Nothing in this section shall be construed to limit or abridge any existing right of access at law or in equity of any party to the records kept by any agency of state or municipal government."

No false or fictitious statement was shown – there was an arrest. Hence there is no action for a false light under 9-1-281(a)(4).

The Court will address unreasonable intrusion as it is unsure if the plaintiff is pressing such a claim. Again, returning to our high court's ruling

> "Here, no physical intrusion upon any private sanctuary occurred, nor did defendant personally harass plaintiffs whenever they appeared in public. Thus, defendant has not violated the statute, notwithstanding the fact that his conduct may have been, at times, offensive to plaintiffs." *Swerdlick*, 721 A.2d at 858.

The plaintiff has failed to establish a claim for unreasonable intrusion under 9-1-28.1(a)(1).

D

Interference with Contractual Relations

Mr. Paiva's fourth count alleges interference with his contractual relations.

In order to establish a claim for tortious interference with a contractual relationship[4], a plaintiff must establish: "'(1) [T]he existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his [or her] intentional interference; and (4) damages resulting therefrom.'" *Belliveau Building Corp. v. O'Coin*, 763 A.2d 622, 627 (R.I. 2000) (quoting *Smith Development Corp. v. Bilow Enterprises, Inc.*, 112 R.I. 203, 211, 308 A.2d 477, 482 (1973)). To form a valid contract, there must be "competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." *Rhode Island Five v. Medical Associates of Bristol County, Inc.*, 668 A.2d 1250, 1253 (R.I. 1996) (quoting Black's Law Dictionary 322 (6th ed. 1990)). Moreover, in Rhode Island, the statute of frauds requires that to enforce an agreement for

[4] There was no allegation in the Fourth Amended Complaint or at trial of any prospective relationship, only an existing contractual relationship.

the sale of real property, the agreement must be signed by the party against whom enforcement is sought. *See* § 9-1-4; *Fogarty v Palumbo*, 163 A.3d 526, 538-39 (R.I. 2017).

The Fourth Amended Complaint alleges a contractual relationship with an employer was harmed. (¶¶ 28-31.). At trial, Mr. Paiva did not establish any concerns with his employers at the time the information was revealed. He discussed a prospective employer's concerns with the company or with a company which conducted a thorough security clearance on him and was aware of the arrest. During testimony, Mr. Paiva revealed that although he was worried that he would not get this position, he was employed by the new company. As he actually received the employment position, the Court finds no harm to a contract and no resultant damages. Mr. Paiva has not established a basis for this count by a preponderance of evidence.

E

Relief[5]

As the plaintiff has proved publication of a private fact in violation of § 9-1-28.1(a)(3), Mr. Paiva would be entitled to appropriate redress and damages, per § 9-1-28.1(b). Plaintiff has not shown any loss of employment, nor has he requested any specific redress. He established only the cost of his attorneys' fees for the motion to seal itself (which preexisted before and was not a consequence of defendant's actions), and the cost of an appeal questioning the appropriateness of a revocation of a gun permit. The revocation of the permit was by Cranston and not shown to be a consequence of the actions of Lincoln. Therefore, no evidence was submitted to substantiate compensatory damages.

Nevertheless, our legislature has clearly established the state's policy of protecting confidential and private information from disclosure, even establishing a private right of action.

[5] This section is included only to avoid a new trial in the event of a remand.

This is a policy that must be adhered to. Accordingly, the Court would award nominal damages to Mr. Paiva of $100 and attorneys' fees after a showing.

F

Lack of Respondeat Superior Liability

The defense alleges that respondeat superior liability may not apply, as no specific police official is named as the responsible party.

> "Allegations that non-party members of the state police may have violated either Fourth Amendment or privacy rights of plaintiff do not give rise to *respondeat superior* liability on the part of supervisors. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978) (municipality cannot be held liable on a *respondeat superior* theory). An employer, whether a municipality or an officer of the government, is only responsible for the acts of a subordinate if the action that is alleged to be unlawful implements or executes a policy promulgated by the superior or the governing body of the entity against whom the complaint is made. *Id.* at 690-91. *Ensey v. Culhane*, 727 A.2d 687, 690 (R.I. 1999).

In *Monell*, the U.S. Supreme Court held that the municipality is liable only in civil rights actions when the constitutional infringement was the result of an official policy. *Monell*, 436 U.S. at 691. Here, the municipality may have erred, but the proof is not clear. There is no showing of a policy to release sealed records. Moreover, there is no specific official named as responsible for the release of the records here.

Therefore, even though Mr. Paiva initially demonstrated a violation of his right to privacy by unreasonable publicity, he is prevented from recovering from the town because there is no respondeat superior liability and no individual police employee was named.

III

Conclusion

Accordingly, Judgment may enter for the defendant and against the plaintiff on all counts. No interest. No costs. Defense counsel shall submit an appropriate Judgment forthwith.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Joseph Paiva v. John Ward, in his capacity as Treasurer and Finance Director for the Town of Lincoln**
CASE NO:	**PC-2017-2602**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 30, 2023**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**Sean M. McAteer, Esq.**
For Defendant:	**Marc DeSisto, Esq.**